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In the Supreme Court
OF THE
United States

OCTOBER TERM 1971

No. 71-1089

CALIFORNIA SHIPPING CO., INC. and
FRED F. NOONAN CO., INC., *Petitioners*
vs.
PACIFIC FAR EAST LINE, INC., and
UNITED STATES LINES, CO., *Respondents*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioners California Shipping Co., Inc. and Fred F. Noonan Co., Inc. respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 30, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is set forth in Appendix A hereto. The opinion of the United States District Court for the Northern District of California was not reported, but is set forth in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 30, 1971. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether summary judgment under Rule 56, Federal Rules of Civil Procedure, was properly granted when so doing deprived Petitioners in an antitrust action of their right to have the weight and credibility of evidence determined by a jury.

FEDERAL RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Federal Rules of Civil Procedure, Rule 56:
   [Text in full in Appendix C hereto.]
2. United States Constitution, Amendment VII:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be

otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Petitioner Fred F. Noonan Co., Inc. (hereinafter "FFNCO") is a California corporation with a principal business of steamship agent. In mid-1967 the Military Sea Transportation Service, Department of Navy, (hereinafter "MSTS") requested proposals from interested parties for furnishing ocean transportation by American flag vessels on a common carriage basis for government cargo in the Pacific Ocean area for the period ending June 30, 1968. Although it did not at that time own any vessels, FFNCO forwarded its bid to MSTS, and on November 15, 1967, was awarded a contract for carriage of military cargo on the West Coast-Far East Trade Route. FFNCO now needed to obtain American flag vessel tonnage which it proposed and intended to obtain through time charter at prevailing commercial rates from its affiliate, Petitioner California Shipping Co., Inc., the latter having been created in late 1967 for the purpose of owning and chartering the required American flag vessel or vessels.

In early December, 1967, Respondent United States Lines, Co. (hereinafter "USL") placed on the market for sale two of its U. S. flag vessels, the SS AMERICAN SCIENTIST and the SS AMERICAN MILLER and Petitioners entered into negotiations, through shipbroker Universal Shipping Co., Inc., of Washington, D.C., for the purchase of these vessels (the SS AMERICAN MILLER later being temporarily withdrawn from sale.)

During the course of these negotiations someone from Respondent Pacific Far East Lines, Inc. (hereinafter "PFEL",) who then retained USL as its agent in the Far East prevailed on USL not to sell the vessel to Petitioners as so doing would enable Petitioners to compete with PFEL in the Pacific Ocean area. After delay, USL resumed negotiations which finally culminated on December 21, 1967, in an agreement for sale of the SS AMERICAN SCIENTIST to Petitioners at the agreed price of $385,000, subject to approval of the United States Maritime Administration ("MARAD") as to sale price, and other terms and conditions not pertinent to this matter. On the same date, MARAD announced substantial increases in the voyage charter rate guidelines applicable to the carriage of government-sponsored commodities moving on U. S. flag vessels. (32 Fed.Reg.249).

On December 26, 1967, MARAD's Ship Valuation Committee met to consider the approval of the sale of the SS AMERICAN SCIENTIST and on the same date determined that the price was below market value and the Committee therefore refused to approve the sale. Petitioners raised their offer to $425,000 (which was probably acceptable to MARAD), but another condition of the sale, MSTS approval of the substitution of another vessel under a USL-MSTS contract could not be obtained at this late date, although it had earlier been approved. Despite these and other later efforts, Petitioners were unable to purchase a United States flag vessel and thus unable to perform under their contract with MSTS.

Petitioners thereafter filed suit in the United States District Court for the Northern District of California

against both USL and PFEL alleging that by reason of their conspiracy in restraint of trade in violation of Title 15, U.S.C. §§1, 2, 15 and 22, there was an ensuing delay in consummating the sale of the SS AMERICAN SCIENTIST at its early December market value and that this delay was prejudicial as the market value of the vessel rose sharply with the announcement of the increased voyage charter rate guidelines so that when the Ship Valuation Committee met five days thereafter, they considered the December 21, 1967 sale price too low, would not approve the sale and Petitioners did not obtain their ship. Petitioners demanded a jury.

Both Respondents answered the complaint and the discovery process commenced, which included the propounding of interrogatories by all parties and the taking of depositions of Milton L. Neighbors, shipbroker and vice president of Universal Shipping Co., Inc., and Alexander Purdon, former President of USL. USL then noticed the discovery deposition by written interrogatories under Federal Rules of Civil Procedure, Rule 31 of Mr. Edward Aptaker, formerly a member of the Ship Valuation Committee at MARAD and the parties propounded interrogatories to Mr. Aptaker. One of USL's interrogatories to Mr. Aptaker inquired whether the proposed sale of the SS AMERICAN SCIENTIST at the price of $385,000 would have been approved if it had been presented to the Ship Valuation Committee at any earlier time in the month of December, and Mr. Aptaker gave the single answer "No". Upon receipt of these answers USL brought its motion for summary judgment in favor of Respondents on the basis that, assuming the existence

of a conspiracy, Petitioners could nonetheless not prove any damages in that the sale of SS AMERICAN SCIENTIST for the pre-December 21, 1967 sale price would not have been approved by MARAD, a material condition of the sale. The District Court agreed and granted USL's motion, and this decision was affirmed on appeal to the United States Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT AS IT HAS DENIED PETITIONERS THE RIGHT TO HAVE GENUINE FACTUAL ISSUES TRIED BY A JURY.

The Courts below both accepted the "testimony" of witness Aptaker as conclusive on the issue of provable damages; in so doing the Courts below failed to apply the proper standard of determining whether there were genuine issues to be tried, and instead usurped the function of the jury to determine the weight and credibility of testimony.

Here the jury could disbelieve or give little weight to the testimony of Mr. Aptaker, either because of its non-expert, hypothetical "opinion" nature, witness Aptaker's potential bias in favor of Respondents, both subsidized steamship lines, deriving from his official duties of protecting subsidized lines, or because of the conflicting evidence regarding the market value of the AMERICAN SCIENTIST during the crucial period of time. (For instance, the testimony of shipbroker Milton Neighbors confirmed that the increased guideline rates had a marked impact on the market value of vessels such as the

AMERICAN SCIENTIST.) It may be that Petitioners would have to overcome the testimony of witness Aptaker at the trial by impeachment and appeal to the jury to disbelieve the truth of his opinion. The summary judgment rule cannot be used to deny Petitioners that right. *Adickes v. Kress & Co.*, 398 U.S. 144 (1970).

Further, even if the jury were to accept witness Aptaker's testimony, it might still properly find that Petitioners were damaged by reason of the delay resulting from the conspiracy in that Petitioners would have had time to look elsewhere for available vessel tonnage, or to offer to USL a price which would have been acceptable to MARAD (which in fact they did) so as to be able to complete their contract with MSTS. As this Court has stated, summary judgment is largely inappropriate in complex antitrust litigation where motive and intent, including credibility and bias of witnesses, play leading roles. *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962); *The White Motor Co. v. United States*, 372 U.S. 253 (1963). Referring specifically to opinion testimony of witnesses on the issue of whether plaintiffs were damaged by defendants' conspiracy this Honorable Court in *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944), stated the rule it is for the jury to decide what, if any, weight is to be given to opinion testimony:

> "the jury, even if such testimony is uncontradicted, may exercise their independent judgment. *The Conqueror*, 166 U.S. 110, 131, 41 L.Ed. 937, 946." (at 627.)

The approach by the courts below in denying Petitioners the right to jury findings on a factual issue is in direct

conflict with the above-cited opinions of this Honorable Court which has consistently upheld Seventh Amendment protections. See, e.g., *International Terminal Operating Co. v. N. V. Nederl. Amerik Stoomv. Maats.*, 393 U.S. 74 (1968); *Beacon Theatres v. Westover*, 359 U.S. 500 (1959); *Dimick v. Schiedt*, 293 U.S. 474 (1935).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
February 22, 1972.

Respectfully submitted,
FRANCIS L. TETREAULT,
Counsel for Petitioners.

DAVID C. NOLAN,
GRAHAM & JAMES,
Of Counsel.

(Appendices Follow)

Appendix A

United States Court of Appeals
Ninth Circuit

No. 26,112

California Shipping Co., Inc. and
Fred F. Noonan Co., Inc.,
Appellants,
vs.
Pacific Far East Line, Inc.,
and United States Lines, Co.,
Appellees.

[Dec. 30, 1971]

Appeal from the United States District Court
Northern District of California

Before: MERRILL, KILKENNY and TRASK, Circuit Judges.

Per Curiam:

This is an appeal from a summary judgment in a case in which appellants allege that through an illegal conspiracy between appellees, in connection with the postponement of the sale of SS AMERICAN SCIENTIST [Scientist], a vessel owned by United States Lines [USL], they were deprived of the purchase of the vessel. Ultimately, negotiations were completed, a sales price agreed upon, but the sale did not take place because

United States Maritime Administration [MARAD], did not approve. Such approval was a condition to the validity of the sale.[1] Discovery procedures, including interrogatories and depositions, were extensively employed on the motion for summary judgment.

Appellants contend that the principal reason for disapproval of the sale, was that effective December 21, 1967 certain guidelines for charges on government freight were revised upwards, thereby increasing the value of ships which carried such freight. They argue that had the sale proposal been concluded and earlier presented for approval, the sale would have been approved.

We search in vain for any evidence which supports the appellants' contention that MARAD would have approved the sale for the price of $385,000.00. For that matter, the MARAD officer, whose duty it was to pass upon proposed sales, when asked by written interrogatory whether the sale of the SCIENTIST would have been approved at the proposed price of $385,000.00 answered "No." Moreover, he testified that the Ship Valuation Committee had reviewed other sales of vessels comparable to the SCIENTIST and that the committee had concluded, on several occasions, during November and December, 1967, that a vessel of this type, in good condition, had a cash domestic value of $450,000.00. Appellants argue that the answer, "No" is a mere opinion. Opinion or not, it

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[1] "During the term of this agreement the Operator [USL] shall not without the prior approval of the United States [MARAD] . . . (2) except in the ordinary course of business, effect any substantial acquisition *or disposition of assets* . . . ." (Emphasis supplied.) [From Operating Differential Subsidy Contract between United States Lines and the United States of America].

is evidence and the appellants presented no evidence to the contrary.

In attempting to create a "genuine issue of fact", under Rule 56 (e), FRCivP, appellants rely on a vague memorandum. The most that can be said of the memorandum, together with the employee's explanation of it, is that one official at USL thought, or hoped, that the proposed deal would meet with MARAD approval. However, the only substantive evidence on the subject is the testimony of the man who made the decision, that is, Mr. Aptaker. Even conceding, as we do, that summary judgments are seldom allowed in conspiracy cases, *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), the fact remains that appellants failed to come forward with evidence which would create a genuine issue of fact. Consequently, the judgment of the trial court must be affirmed. *United States v. Gossett*, 416 F.2d 565 (9th Cir. 1969), *cert. denied* 397 U.S. 961 (1970); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159-160-161 (1970).

It Is So Ordered.

Appendix B

In The United States District Court For The Northern District of California

Case No. 50228-ACW

California Shipping Co., Inc. and Fred F. Noonan Co., Inc.,
Plaintiffs,

vs.

Pacific Far East Line, Inc., and United States Lines, Co.,
Defendants.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This motion for dismissal, brought by defendant United States Lines under Rule 56 of the Federal Rules of Civil Procedure, was argued before the Court and taken under submission on March 6, 1970.

Plaintiffs allege that through an illegal conspiracy between defendants, negotiations for the sale of the SS AMERICAN SCIENTIST by defendant United States Lines (USL) to plaintiffs were temporarily suspended for some days in December, 1967. Ultimately negotiations were completed and a price agreed upon, but the sale did

not take place because the United States Maritime Administration disapproved of the agreed price. Such approval was necessary before any sale of the vessel in question could be consummated. Plaintiffs contend that the principal reason for MARAD disapproval was that effective December 21, 1967, certain guidelines for charges on government freight were revised upwards, thereby increasing the value of ships which carried such freight. Plaintiffs argue that had the sales agreement been concluded and presented to MARAD earlier, the price would have been approved by MARAD, and plaintiffs would have had their ship.

For purposes of the present motion, the existence of a conspiracy between defendants will be assumed. It will also be assumed that were it not for the conspiracy MARAD would have considered the proposed sales price prior to the promulgation of the new freight charge guidelines. Defendants' point, favorable consideration of which must result in summary judgment for them, is that the affidavits, depositions, and pleadings thus far filed show that even had the sales agreement been more timely submitted MARAD would still have disapproved it. This being the case, plaintiffs' claimed damages were not the result of any alleged conspiracy between defendants.

The MARAD officer whose duty it was to pass upon proposed vessel sales of this sort was Mr. Edward Aptaker, Chief of the Office of Government Aids. Mr. Aptaker, when asked by written interrogatory whether sale of the SS AMERICAN SCIENTIST would have been approved at the proposed price of $385,000 had the re-

quest for approval been received at any time earlier in December, 1967, answered "No" (answer to direct interrogatory #4). Plaintiffs say that this is, at best, opinion testimony by a person not an expert in ship valuation problems. The Court, however, finds that whether or not the "opinion" comes from an expert is irrelevant; its real weight comes from the fact that it was Mr. Aptaker, and Mr. Aptaker alone, who would have approved or disapproved of the sale. Furthermore, the cited testimony becomes much more than opinion when considered along with the other answers made by Aptaker to questions posed by both sides to the instant dispute. In answer to cross-interrogatory #13, he affirmed that the Ship Valuation Committee had reviewed other sales of vessels comparable to the SS AMERICAN SCIENTIST, and that the Committee had concluded on several occasions during November and December, 1967, that a C2-S-B1 vessel in good condition had a cash domestic value of $450,000. This is considerably in excess of the $385,000 offered by plaintiffs for the vessel in question. This is not Mr. Aptaker's speculation as to "what might have been"; it is his recital of what had in fact been his, and the Committee's policy at the time plaintiff claims the sales agreement should have been submitted for approval.

Finally, there is Mr. Aptaker's testimony regarding the worksheet utilized by the Committee during its consideration of the proposed sale of the SS AMERICAN SCIENTIST. This indicated that a canvass of six ship's brokers at the time in question showed that a vessel of the class of SS AMERICAN SCIENTIST had a market

value estimated at between $450,000 and $610,000. These estimates were specifically noted to have been made without consideration of possible changes in the government cargo rate guidelines (answer to cross-interrogatory #20). Mr. Aptaker thus affirmed that the Committee's disapproval was quite independent of the new guidelines, and reflected policies followed throughout November and December of 1967. Whether United States Lines requested approval of its sale of the vessel in early or late December would have made no difference. MARAD would have disapproved regardless.

Plaintiffs offer evidence to the effect that United States Lines considered the price offered by plaintiffs to have been in its own best interests at the time of the sale. This may well be true, but this has little to do with how MARAD would view the sale from the standpoint of a fair domestic cash value for the vessel. USL may well have had its own reasons for wanting the sale approved, reasons which made it advisable *for USL* to accept the lower-than-going-price.

Plaintiff also advances as evidence of a genuinely disputed issue of fact a rather cryptic memorandum of a conversation between Mr. Heine, a USL executive, and Mr. Milton Neighbors, a private ship broker. The memo asks "When MARAD approval? Prompt. Already cleared with MARAD". This, combined with Mr. Neighbors' explanation of it in his deposition, indicates only that one official at USL thought, or hoped, that the proposed deal would meet with MARAD approval. But the only real evidence of what MARAD would do is the testimony of the man to whom this decision was delegated, i.e. Mr.

Aptaker. No evidence, admissible at trial, has been advanced to indicate that either the mind of the Ship Valuation Committee, or the mind of Mr. Aptaker, was any different in early December, 1967, from what Mr. Aptaker described them to be. The Court is well aware that summary procedures should be seldom used in anti-trust cases "where motive and intent play leading roles the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot". *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962). The evidence in this case, however, as far as the impact/damage issue is concerned, is in the hands of a government agency; that agency has made no effort to conceal the truth, and the government official whose decision was so crucial to plaintiffs' cause herein has not been hostile. All parties have had an opportunity to submit written interrogatories to him. No evidence of real relevance has been advanced to counter his testimony.

Accordingly, the Court grants the motion for summary judgment, and it is ORDERED that the plaintiffs take nothing, that the action be dismissed on the merits, and that defendants recover from plaintiffs their costs of action.

Dated: March 18, 1970.

Albert C. Wollenberg,
United States District Judge.

Appendix C

Rule 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon

the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defence Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)